CIVIL APPEAL.

M. Shanker for the plaintiffs.

William Chen for the defendant.

Cur. Adv. Vult.

Vohrah J.: This is an appeal from the decision of the learned President of the Sessions Court, Kuala Lumpur, dismissing with costs the plaintiffs' claim for vacant possession of a shop-house and for special damages for its unlawful occupation.

For the purposes of the appeal the following facts are relevant. The plaintiffs are the registered owners of the shop-house which is a two-storeyed building situated at No. 3445, Jinjang North, Kepong, Selangor. On March 4, 1971 they entered into an agreement with the defendant giving him a lease of the whole of the ground floor of the building for a period of 6 years commencing from August 15, 1970. Clause 4(c) of the agreement provided for the defendant to have the first option to renew the lease for a period of 6 years at a reasonable rent to be mutually agreed upon. The plaintiffs' qualified title (See AR48) which was originally issued and registered on May 23, 1970 clearly stipulated that the land upon which the building stood could not be transferred, leased, tenanted, charged or otherwise disposed of without the written approval of the Collector of Land Revenue for a period of 10 years from the date of registration of the title so that this restriction on the face of the document continued up to and including May 22, 1980. The agreement was not registered as required under section 222 of the National Land Code. On June 7, 1976 the plaintiffs gave notice that they did not wish to renew or extend the lease and indicated that they would take vacant possession of the building on August 15, 1976 (See AR56). The defendant, however, on July 16, 1976 replied intimating his intention to exercise his option under Clause 4(c) to renew the lease for another six years leaving the question of the rental at large (See AR61). On July 28, 1976 the plaintiffs again reiterated their intention not to renew the lease and gave notice of the institution of legal proceedings if vacant possession was not delivered by August 15, 1976 (See AR62).

It is very clear from the qualified title, despite the expert opinion of the Assistant Collector of Land Revenue (DW1), that the restriction which appears on its face applied not to the approved application as such but to the title itself so that the provisions of section 225 operated in this case. It is also very clear that the agreement for the lease is not in the prescribed form as required under section 221. On these facts alone it is obvious that the agreement could not have been registered and consequently is not enforceable under the National Land Code as not having vested an interest in the defendant (See *Ho Ying Chye* v. *Teh Cheong Huat*[1] and *Lee Lum Soh* v. *Low Ngah*[2]). It is in fact void for being in breach of the Code. That being the case, in my view, the defendant cannot rely upon a provision contained in the void agreement as conferring upon him the right to exercise an option. However, counsel for the defendant contended that the provisions of section 206(3) operate in this case to convert the void lease into a valid agreement to grant a lease enforceable in equity. But the plaintiffs did not purport to terminate the lease during its currency but merely drew the attention of the defendant to the fact that the tenancy would expire by effluxion of time. Therefore the defendant cannot rely on any protection being afforded by section 206(3) since, in my view, this subsection affords protection only in relation to the term of a current agreement and does not extend to protect a right to enter into a future agreement. In the result the appeal is allowed with costs here and below. As the plaintiffs in their statement of claim have limited their claim for damages to $3,000, I award them this sum with interest as prayed.

Appeal allowed.

Solicitors: *Shearn, Delamore & Co.; William Chen & Co.*

E.I. LTD. v. DIRECTOR-GENERAL OF INLAND REVENUE

[A.C.J. (Vohrah J.) January 17, 1981]
[Kuala Lumpur — Tax Appeal No. 1 of 1978]

Revenue Law — Income Tax — Double Taxation Relief — Management fees paid to company resident in the U.K. with no permanent establishment in Malaysia — Royalties — Assessments — Income Tax Act, 1967, ss 2, 4(d), 15(b) & 132(1) — Double Taxation Relief (U.K.), Order 1973, arts. VI, XI & XXVI(1)(a).

EIL was incorporated in the United Kingdom and was resident there. It entered into an agreement with *PA* to set up *EISB* in Malaysia for purposes of manufacturing catheters. The said agreement provided for *EIL* to appoint 3 directors to the board of *EISB* and for these directors and for other *EIL* employees to provide managerial, planning, training, technical, operational, marketing and development services to *EISB*. In the result, *EISB* paid to *EIL* certain amounts as managerial fees. The Inland Revenue treated these payments as royalties within the definition of section 2 of the Acts and accordingly made assessment on *EIL* under section 4(d). EIL challenged these assessments but the Special Commissioners decided that the payments were royalties under section 2 and that they were correctly charged to income under section 4(d). On appeal,

Held, allowing the appeal: (1) since the definition of "royalties" in article XI of the Relief Order did not apply it was clear by virtue of paragraph 1 of article VI that any income of *EIL* was taxable only in the United Kingdom since it did not carry on business in Malaysia through a permanent establishment situated therein;

(2) it was not appropriate in this case to call in aid the provisions of section 15(b) of the Income Tax Act, without which the Inland Revenue would not have been able to charge tax on this income of *EIL* under the provisions of section 4;

(3) the decision of the Special Commissioners confirming the assessment made by the assessment made the Inland Revenue was therefore wrong in law.

CASE STATED.

James Puthucheary for the appellants.

Mokhtar Sidin (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Vohrah J.: This is an appeal by way of case stated from a decision of the Special Commissioners of Income Tax confirming assessments to income tax made under section 4(d) of the Income Tax Act, 1967 by the respondent (DGIR) upon the appellant company (EIL) in respect of certain payments received

from E.I. Sdn. Bhd. (EISB). The question for determination is whether the assessments were correctly made having regard to the Double Taxation Relief (United Kingdom) Order, 1973 (P.U.(A) 241/73) and to section 4(a) of the Act.

The relevant facts are briefly as follows. EIL was incorporated in the United Kingdom and, for the purposes of Malaysian Income Tax, is resident there and has no permanent establishment in Malaysia. On May 9, 1973 it entered into an agreement with a Malaysian company, Plantations Agencies Sdn. Berhad, to set up EISB in Malaysia with its registered office in Penang for the purpose of manufacturing catheters. This agreement (AB23) provides, *inter alia*, for EIL to appoint three directors to the board of EISB and for these directors and for other EIL employees to provide managerial, planning, training, technical, operational, marketing and development services to EISB. In the result, EISB paid to EIL the following amounts as managerial fees: —

Period	*Amount*
From 1.6.73 to 31.12.73	$35,217.00
Year ending 31.12.74	56,134.00
Year ending 31.12.75	49,152.00.

DGIR treated these payments as royalties within the definition of section 2 of the Income Tax Act, 1967 and accordingly made assessments on EIL under section 4(d). EIL challenged these assessments but the Special Commissioners decided that the payments were royalties as defined by section 2 of the Act and that they were correctly charged to income tax under section 4(d).

In the appeal before me it was common ground that the payments were management fees which were paid to a company resident in the United Kingdom with no permanent establishment situated in Malaysia. It was also common ground that the sums paid were royalties within the definition of section 2 of the Act as amended on March 1, 1973 effective for the year of assessment 1973 but were not so within the definition of paragraph 3 of Article XI of the Relief Order which specifically declares that the agreement entered into between the Government of Malaysia and the Government of the United Kingdom and Northern Ireland was made "with a view to affording relief from double taxation in relation to Malaysian tax and United Kingdom tax" as defined in the agreement which was reproduced in the Relief Order and came into effect on July 25, 1973 although signed on March 30, 1973 "as respects Malaysian tax for any year of assessment beginning on or after January 1, 1973" (See Article XXVI(1)(a)). Whatever the sequence of the coming into effect of section 2 of the Act and of the Relief Order, by virtue of section 132(1) of the Act which reads as follows —

"If the Minister by statutory order declares that —

(a) arrangements specified in the order have been made by the Government with the government of any territory outside Malaysia with a view to affording relief from double taxation in relation to tax under this Act and any foreign tax of that territory; and

(b) it is expedient that those arrangements should have effect,

then, so long as the order remains in force, those arrangements shall have effect in relation to tax under this Act notwithstanding anything in any written law."

it is obvious that the provisions of the Relief Order during its currency would override those of the Act in favour of its beneficiaries. I do not think it can be disputed that the payments to EIL as management fees were in fact income to EIL for the management services it provided to EISB in compliance with Clause 5 of the Heads of Agreement entered into between EIL and PASB on May 9, 1973 for the establishment of EISB (See AB23). Article VI of the Relief Order provides: —

"1. The income or profits of an enterprise of one of the Contracting States shall be taxable only in that Contracting State, unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, tax may be imposed in that other Contracting State on the income or profits of the enterprise but only on so much thereof as is attributable to that permanent establishment.

2. ....

3. ....

4. ....

5. Where income or profits include any item or profits which is dealt with separately in another Article of this Agreement, the provisions of that other Article shall not be affected by the provisions of this Article."

Since the definition of "royalties" in Article XI does not apply it is clear by virtue of paragraph 1 above that any income of EIL is taxable only in the United Kingdom since it does not carry on business in Malaysia through a permanent establishment situated therein. As the provisions of the Relief Order bear no ambiguity and as it applies in this case, I do not consider that it was appropriate to call in aid the extraneous, presumptive provisions of section 15(b) of the Act without which, it seems to me, DGIR would not have been able to charge tax on this income of EIL under the provisions of section 4. I am accordingly of the view that the decision of the Special Commissioners confirming the assessments made by DGIR is wrong in law.

The appeal is allowed with costs.

Appeal allowed.

Solicitors: *Skrine & Co.*

BONG MIEW v. PATRICK TING

[O.C.J. (Yusoff Mohamed J.) January 23, 1980]
[Kuching — Civil Suit No. K.138 of 1975]

Tort — Negligence — Damages — Road accident resulting in death of pedestrian — Res ipsa loquitur plea by plaintiff — Whether doctrine applicable — Civil Law Act 1956.

The plaintiff in this case was the husband and administrator of the deceased's estate. He claimed for damages under the Civil Law Act 1956 arising out of a motor vehicle accident which resulted in the death of his wife. The motor car involved was driven by the defendant. The statement of claim alleged that the deceased was crossing the road after having been discharged from a bus when she was knocked down by the motor-car coming from behind the bus which said motor car was negligently driven by the defendant. The plaintiff relied on the doctrine of *res ipsa loquitur*. The defence alleged that the deceased had negligently run across the road causing the accident.